No. 99-484

IN THE

Supreme Court of the United States

CLARENCE ROBERTS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GUERNSEY COUNTY, OHIO FOR THE FIFTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Trial Court permitted the alternate jurors to be present during jury deliberations of the guilt phase of a capital murder case, pursuant to *United States v. Olano*, 507 U.S. 725 (1993), prejudice cannot be presumed so as to per se violate Petitioner's constitutional rights of due process, without a showing of prejudice, notwithstanding that Petitioner's counsel objected to the alternates' presence.

2. Pursuant to the *Strickland* test, where Petitioner cannot show that: (1) his appellant counsel's performance fell below an objective standard of reasonableness and that (2) he was prejudiced thereby, he is not entitled to his claim that he received ineffective assistance of counsel on his appeal where the Trial Court's permitted the alternate jurors to be present during deliberations of the guilt phase of a capital murder case following a previous appellate court ruling that this was not error and nothing in the record showed that Petitioner was prejudiced.

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REASONS FOR DENYING THE WRIT

Petitioner argues that where his trial counsel did object to the Trial Court's decision to permit the alternates to sit in on the jury deliberations which is a deviation to Ohio's Crim. R. 24(F), this Court should adopt a per se standard considering the similar provisions of Fed. Crim. R. 24(c).

In Ohio, Crim. R. 24(F) provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." It is a general rule that alternates may not replace regular jurors after the jury retires to deliberate. *State v. Hutton*, 53 Ohio St. 3d 36, 46, 559 N.E.2d 432, 444 (1990). The general rule is not absolute — Ohio's courts have recognized that, although expressed in mandatory terms, Ohio's Crim. R. 24(F) does not state a per se cause for reversal. *State v. Blair*, 34 Ohio App. 3d 6 (1986); *State v. Miles*, 77 Ohio App. 3d 786 (1991); *State v. Girts*, 121 Ohio App. 3d 539 (1997).

Respondent, State of Ohio, disagrees with Petitioner that this is an issue of first impression. This Court has discussed this very issue concerning the presence of alternate jurors during jury deliberations extensively and definitively in *United States v. Olano*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). Yet, Petitioner argues that where trial counsel objects to the Trial Court's procedure of having the alternate jurors be present during deliberations, the *Olano* holding should somehow be distinguished.

In *Olano*, this court specifically stated, "The presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact. Nor have respondents made a specific

showing of prejudice. Finally, we see no reason to presume prejudice here." *Id.* at 737, emphasis added.

The *Olano* holding applies in this instance. The *Olano* Court did indirectly address the scenario where an objection was raised. In *Olano*, the government conceded that the presence of the jurors was "error" that was "plain." *Id.* at 737. The Court went on to analysis the case as such stating, "[I]t was a separate question whether such a deviation amount to 'error' when the defendant consents to the alternates' presence." *Id.* at 737. The court focused its attention on whether the error "affected substantial rights."

Justice Kennedy stated in his concurring opinion:

> If the majority's understanding of "substantial rights" is correct, then even an objection by respondents to the alternates' presence during jury deliberations would not have mandated reversal here; instead, the Rule 24(c) violation would have been subject to harmless-error review, as it did not "affect substantial rights" within the meaning of Rule 52(a).

Id. at 744.

In analyzing the issue as the majority of this Court did in *Olano*, the same results would be found in this matter; that is, a finding that Petitioner's substantial rights have not been affected. Therefore, even where an objection by Petitioner to the alternates' presence during jury deliberations was made, the *Olano* decision commands that the Rule 24(c) violation be subjected to harmless-error review as it did not "affect substantial rights" within the meaning of Rule 52(a).

Further, the Olano Court stated:

> Assuming arguendo that certain errors "affec[t] substantial rights" independent of prejudice, the instant violation of Rule 24(c) is not such an error . . . [T]he primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence. "[I]f no harm resulted from this instruction [of an alternate juror into the jury room,] reversal would be pointless." *United States v. Watson*, 609 F.2d 1374, 1391 (CA 11 1982).

Id. at 737-738.

> . . . [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were than the rule, few trials would be constitutionally acceptable . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Id. at 738, *quoting Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Finally, In plain error analysis, the *Olano* court determined prejudice by asking whether the error created a manifest injustice or seriously affected the "fairness, integrity or public reputation of [the] judicial proceedings." *Id.* at 736, *quoting United States v. Atkinson*, 297 U.S. 157, 160 (1936).

Here, as in *Olano*, the trial judge did give the alternates a very specific cautionary instruction limiting their participation in the deliberations. *See* Appendix B, 13a-14a. Additionally, it must be presumed that jurors followed the instructions of the court. *Id.* at 740, *quoting Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Further, Petitioner's argument that the jurors were "chilled" is without merit as this Court expressly rejected the argument concerning a "chilling" effect associated with the mere presence of alternates in deliberations. *Id.* at 740. As in *Olano*, Petitioner submitted nothing to suggest that the alternates ignored the trial judge's order to remain silent, or that they "chilled" the deliberations. Consequently, Petitioner fails to show how the verdict had been tainted by the presence of the alternate jurors so to create "a manifest injustice or seriously affects the fairness, integrity or public reputation of [the] judicial proceedings."

Because the alleged error in this case does not affect "substantial rights" nor is there any showing that creates "a manifest injustice or seriously affects the fairness, integrity or public reputation of the judicial proceedings," this Court should find that the *Olano* decision sufficiently addresses the issue and the Appellate Court's decision was proper.

The second questions concerns whether Petitioner was denied effective assistance of counsel during his appeal. In order to establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984), emphasis added. The Ohio Supreme Court has stated that the standard for determining deficient performance is whether counsel's performance fell below an objective

standard of reasonableness. *State v. Bradley*, 42 Ohio St. 3d 136 (1989), paragraph two of the syllabus. To show prejudice, a defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the results would have been different. *Id.* at paragraph three of the syllabus.

In Petitioner's appeal, the Fifth District Appellant Court did not address any alleged deficiency of counsel's performance; it examined only the prejudice suffered by Petitioner as a result of the alleged deficiencies. In denying his application to reopen the matter based upon Petitioner's failure to satisfy the second prong of the *Strickland* test, the Appellant Court stated: "Appellant's argument he was prejudiced by the presence of the alternate jurors during deliberations is based purely upon speculation and is unsupported by the record. We find the state of the present record does not support appellant's assertion." Pet. A-2-3.

Similarly, this Court should find that without any support in the record that would show prejudicial impact, Petitioner cannot satisfy the second prong of the *Strickland* test.

Yet, assuming arguendo, that Petitioner can somehow show that he was prejudiced by counsel's deficiencies, pursuant to the *Strickland* test, Petitioner still must show his counsel's failure fell below an objective standard of reasonableness. Again, considering the record of this matter, Petitioner cannot make this showing.

At trial, the court specifically made inquires of counsel as to whether the Fifth District Court of Appeals had reviewed the practice of permitting the alternative jurors to be present during deliberations of the guilt phase of a capital

murder case. The Trial Court did find that the issue had recently been reviewed in *State v. Voorhies* (June 14, 1995), Guernsey App. No. 94-CA-8, unreported. The *Voorhies* Court, based on the *Hutton* case where the Ohio Supreme Court recognized that a capital murder trial differed from other trials since a capital murder trial is bifurcated, stated, "We find that Crim. R. 24(F) is not applicable to a capital murder case and the trial court did not err when it failed to discharge the alternate jurors prior to the commencement of deliberations during the guilt phase of appellant's trial." *Id.* at 9.

With *stare decisis* in mind and the *Voorhies* opinion specifically noted on the record and followed by the Trial Court, certainly, not arguing the issue at hand cannot be found to be such a deficiency that would "fall below an objective standard" of reasonable performance on the part of the counsel for petitioner on appeal of right in this matter.

Where, it is Petitioner's burden to show: (1) his counsel's performance fell below a standard of reasonableness; and (2) he was prejudiced thereby, and based upon the record in this matter, he fails to make such a showing, this Court should find that his claim that he had ineffective assistance of counsel is without sufficient merit.

CONCLUSION

As stated above, previously this Court in *Olano*, supra, sufficiently and definitively addressed the very issue raised herein. Further, the *Olano* Court held that "if no harm resulted from the presence of the alternate jurors, reversal would be pointless" and therefore prejudice must be shown. Where Petitioner's alleged prejudice is based purely upon speculation and is unsupported by the record, it certainly cannot be determined that he was sufficiently prejudiced to merit any determination that the presence of the alternative jurors during the guilt phase of the jury deliberations "created a manifest injustice or seriously affected the fairness, integrity or public reputation of the judicial proceedings."

For the reasons set forth above, Respondent, State of Ohio, respectfully requests that the United States Supreme Court deny Petitioner his request for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE COURT OF APPEALS, GUERNSEY COUNTY, OHIO, FIFTH APPELLATE DISTRICT DATED AND FILED JUNE 14, 1995

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. W. Don Reader, J.
Hon. John W. Wise, J.

Case No. 94-CA-8

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT D. VOORHIES

Defendant-Appellant

OPINION

CHARACTER Of PROCEEDING: Criminal appeal from the Court of Common Pleas Case No. 92 CR 113

JUDGMENT: Affirmed

Appendix A

* * *

WISE J.

Appellant Robert Voorhies married Judy Voorhies in 1969. Three children were born as issue of this marriage. Evidence presented during the trial established that appellant and his wife had a stormy relationship mainly due to alcohol abuse. Appellant filed for divorce; however, the case was dismissed because he was a full-time member of the military and was called to action in Desert Storm. Following his discharge from the military, appellant returned to Guernsey County and was in the process of purchasing a store in Center, Ohio when the homicide occurred.

On September 26, 1992, the day of the shooting, appellant and a friend, Terry Chapman, began drinking at Deep Cut Tavern after work. They had a couple of beers together and appellant left the bar and returned to his residence in Birmingham, Ohio. Upon returning home, at his residence was appellant's daughter, Melissa Voorhies and her boyfriend, Pete Hossip. Also present were John Asp, and Kevin Crosby. John Asp testified that when appellant entered the residence, he saw an object sticking out from underneath appellant's coat with an orange label on the handle. Tr. of Asp Trial Deposition, p. 1238. The object with the orange label on it was later determined to be the murder weapon.

Appellant began drinking beer and smoked a marijuana cigarette with the persons at his residence. Appellant also ingested what he believed to be speed. Appellant began

talking about violence and watched a videotape of a war scene from Desert Storm. Appellant told Asp how he liked violence and related an incident when he pushed his wife through a glass window two days prior. *Id.* at 1246-47.

Some time later, Appellant left his residence and proceeded to Salesville. Appellant arrived at the residence of John Daugherty, Judy Voorhies' step-father. Upon arriving at Mr. Daugherty's residence, appellant noticed that his wife was intoxicated. The couple began to argue and Judy Voorhies told Mr. Daugherty to get his rifle. Shots were exchanged and all three were injured. Mr. Daugherty later died from the wounds he received as a result of the shooting.

On October 15, 1992, appellant was indicated by the Guernsey County Grand Jury for one count of aggravated murder with a death penalty specification and firearm specification and attempted aggravated murder along with a physical harm specification and a firearm specification. The case proceeded to trial and on January 28, 1994, the jury returned a verdict of guilty of murder, the lesser included offense of count one of the indictment along with the firearm specification. The jury also returned a guilty verdict on count two for attempted murder, the lesser included offense. Appellant was sentenced accordingly.

Appellant filed his Notice of Appeal on February 23, 1994, setting forth the following assignments of error:

1. APPELLANT VOORHIES' RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO CHANGE VENUE OF THE

Appendix A

TRIAL TO A JURISDICTION IN WHICH MR. VOORHIES COULD RECEIVE A FAIR AND IMPARTIAL TRIAL.

II. APPELLANT VOORHIES WAS DENIED A FAIR TRIAL BECAUSE HIS CONVICTION WAS BASED UPON THE PERJURED AND INCREDIBLE TESTIMONY OF JUDY VOORHIES.

III. THE TRIAL COURT ERRED IN ADMITTING THE VICTIM'S OUT OF COURT (SIC) STATEMENT AS A DYING DECLARATION EXCEPTION TO THE HEARSAY RULE.

IV. THE TRIAL COURT ERRED IN ALLOWING THE ALTERNATE JURORS TO BE PRESENT DURING JURY DELIBERATIONS WHEN THEY WERE NOT NEEDED AND WERE NOT PROPERLY SUBSTITUTED.

I

In his first assignment of error, appellant claims the trial court erred in failing to change venue of the trial due to pretrial publicity surrounding the case. In addressing this assignment of error, we first note that a review of the record establishes that defense counsel never requested a change of venue. Normally, issues not raised at the trial court level are not reviewable on appeal. However, this issue presents an

exception to the rule since R.C. 2901.12(K) and Crim. R. 18(B) specifically provide that a change of venue may be granted upon motion of the prosecution, the defense, or the trial court.

Therefore, we must determine whether the trial court erred when it failed to change venue upon its own motion. An appellate court will not disturb a trial court's ruling on a motion for change of venue unless it is clearly established that the trial court abused its discretion. *State v. Fairbanks* (1972), 32 Ohio St.2d 34, 37. It is not necessary that a showing of identifiable prejudice be established by the defendant prior to granting a change of venue if there exists a likelihood that prejudicial news prior to trial will prevent a fair trial. *Sheppard v. Maxwell* (1966), 384 U.S. 333, 363.

The mere fact that there is pretrial publicity does not automatically require a change of venue where the prospective jurors have not read or heard the report or the prospective jurors have stated during voir dire that they will judge the defendant solely on the law and evidence presented at trial. *Fairbanks, supra*, at syllabus. The examination of jurors during voir dire is the best test to determine whether prejudice exists in the community against the defendant. *State v. Maurer* (1984), 15 Ohio St.3d 239, 250-251. Where the opinions of prospective jurors are not fixed and would yield readily to evidence, the trial court does not abuse its discretion in failing to change venue. *Id.* at 251.

A review of the record in this matter establishes that the trial court asked prospective jurors, as a panel, the extent of their exposure to media coverage concerning this case. The

trial court also questioned each juror individually, in chambers, concerning their media exposure to the case. We reviewed each juror's response that was selected to sit on the jury. Almost all of the jurors recall reading about the case in the Jeffersonian when the murder first occurred. In camera, none of the jurors seated on the jury indicated that they could not be fair and impartial and listen to the evidence presented prior to making a decision in this case.

We also note the large time span from the time appellant committed the offenses until he was brought to trial. The offenses were committed on September 26, 1992 and appellant's trial began on January 13, 1994, after the jury was selected and sworn. The majority of news coverage occurred in 1992. As evidenced by the jurors' responses, most remember initially reading about the case, but because of the large time span between the commission of the offenses and the start of trial, they could not recall details of the case.

Based upon the answers of the jurors that served on the jury, we find that the trial court did not abuse its discretion in failing to change venue in this matter. It is apparent from the responses of the jurors that appellant was not prejudiced by the trial court's decision to conduct appellant's trial in Guernsey County. Appellant's first assignment of error is overruled.

II

In his second assignment of error appellant claims that he was denied a fair trial because his conviction was based upon the perjured and incredible testimony of Judy Voorhies.

Appellant bases this assignment of error upon the fact that Judy Voorhies gave conflicting versions of what happened the night of the shooting. Appellant also claims that Judy Voorhies was so intoxicated that she could not possibly know what transpired that evening.

The jury's duty is to decide the weight to be given evidence and the credibility of witnesses. *State v. Jamison* (1990), 49 Ohio St.3d 182, 191, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A jury verdict will not be reversed by a reviewing court where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *Id.* citing, *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus.

We find that ample evidence was presented to support appellant's conviction. Judy Voorhies' credibility was tested through cross-examination. The jury decided to accept her testimony. Since sufficient evidence was presented to support all of the elements of the offenses, we will not reverse the jury verdict merely because the jury chose to believe the testimony of Judy Voorhies. Appellant's second assignment of error is overruled.

III

Appellant next argues that the trial court erred in admitting the victim's out-of-court statements made to various persons he encountered following the shooting as dying declarations pursuant to Evid.R. 804(B)(2). Evid.R. 804(B)(2) is an exception to the hearsay rule and is defined as follows:

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> In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

We find that the trial court did not err in determining that the statements made by the decedent John Daugherty were dying declarations pursuant to Evid.R. 804(B)(2). Based upon the circumstances at the scene of the shooting, it was apparent that Mr. Daugherty believed his death was imminent. We reach this conclusion from the following sources.

First, Mr. Daugherty told Chris Tarbin that he was dying. Tr. of Tarbin Trial Deposition, p. 1546. Second, there was testimony from at least two witnesses that there was a lot of blood on and around Mr. Daugherty. Tr. of Kehl Trial Deposition, p. 1509; Tr. of Deputy Dan Vincent Tr. Deposition, p. 1639, 1643. It also appeared to both Kehl and Deputy Vincent that Mr. Daugherty was in a lot of pain. *Id.* Third, Deputy Vincent testified that he could see a hole in the side of Mr. Daugherty's body. Tr. of Vincent Trial Deposition, p. 1642. Finally, Dr. Michael Sarap, the doctor that performed surgery on Mr. Daugherty, testified that Mr. Daugherty had very severe injuries. Tr. of Sarap Trial Deposition, p. 1872.

Based upon the above testimony presented at trial, we find that Mr. Daugherty believed his death to be imminent and the trial court did not err when it permitted the

introduction of Mr. Daugherty's statements concerning who shot him pursuant to the dying declaration exception of the hearsay rule. Appellant's third assignment of error is overruled.

IV

In his final assignment of error, appellant claims that the trial court erred in permitting the alternate jurors to be present during jury deliberations when they were not needed or properly substituted. In support of his argument, Appellant cites Crim.R. 24(F) which states in part:

> * * * An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. * * *

The trial of this matter was bifurcated since it was a capital murder case. As such, in the first part of the case, the jury was required to determine appellant's guilt or innocence. After finding appellant guilty, the jury had to deliberate again on punishment. The law in Ohio requires that the same trial jury deliberate for the guilt and penalty phase of a capital murder trial. *State v. Penix* (1987), 32 Ohio St.3d 369, 373. The trial jury consists of all the jurors including any properly substituted alternates. *State v. Hutton* (1990), 53 Ohio St.3d 37, 45.

We find that the trial court did not err in failing to discharge the alternate jurors pursuant to Crim.R. 24(F). In the *Hutton* case, the Ohio Supreme Court recognized that capital murder trials differ from other trials since a capital

murder trial is bifurcated, *Hutton*, *supra*, at 46. As such, the Ohio Supreme Court set forth two reasons why it would not be appropriate to apply Crim.R. 24(F) to a capital murder case.

First, an alternate juror who was present during the trial and penalty deliberations would be able to take a full and productive part in the penalty deliberations as any of the original jurors. The presence of the alternate juror during penalty phase deliberations would not change the character of the jury. *Id.* at 47, citing *People v. Green* (1971), 15 Cal.App.3d 524, 528. Second, the application of Crim. R. 24(F) could actually prevent the State from obtaining the death penalty because an excused juror after the verdict, but before the penalty phase, would foreclose the State from obtaining the death penalty since a defendant can only be sentenced to death upon the recommendation of the trial jury. *Hutton, supra*, at 47, *Penix, supra*, at 373.

We find that Crim.R. 24(F) is not applicable to a capital murder case and the trial court did not err when it failed to discharge the alternate jurors prior to the commencement of deliberations during the guilt phase of appellant's trial.

For the foregoing reasons, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is hereby affirmed.

By: Wise, J.
Gwin, P.J., and
Reader, J., concur.

Appendix A

s/ John W. Wise
s/ W. Scott Gwin
s/ W. Don Reader

JUDGES

Appendix A

IN THE COURT OF APPEALS FOR
GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CASE NO. 94-CA-8

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT D. VOORHIES

Defendant-Appellant

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is affirmed.

s/ John W. Wise
s/ W. Scott Gwin
s/ W. Don Reader

JUDGES

APPENDIX B — EXCERPT OF TRANSCRIPT OF TRIAL PROCEEDINGS

IN THE COURT OF COMMON PLEAS IN THE FIFTH DISTRICT COURT OF APPEALS IN AND FOR GUERNSEY COUNTY, OHIO

CASE NO. 97 CR 63

STATE OF OHIO

PLAINTIFF,

VS.

CLARENCE "SKIPPY" ROBERTS

DEFENDANT

Transcript of the TRIAL PROCEEDINGS held on September 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, October 3 & November 4, 1997, before the Honorable DAVID A. ELLWOOD, Judge.

* * *

[p. 1827] * * *

* * * I will now give my charge of law and instructions to the two alternate jurors.

Your conduct in the jury room is very important [p. 1828] You are not permitted to deliberate with the jurors or express any opinion. You are there solely for the purpose of knowing

the deliberations of the jurors so if anything unforeseen would arise to one of these 12 in this phase of the trial or if we would move to the second phase that is possible in this trial and you are then substituted in as a juror, you know what has occurred during deliberations.

There are no clear instructions of law that I should give you at this time so I will use my own analogy. You should be like a fly or flies on the wall. You should observe, you should listen but you should not in any way participate and it is highly improper if you express your opinion or influence the other 12 jurors in any way. Remember, your role as alternates is just that. You will be designated a trial juror if and only if some unforeseen event would occur with any of the 12 and I would then advise you to commence deliberations. Listen, know what has gone on but do not participate. Do you have any questions? All right.

* * * *